Supreme Court of the United States

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

Sirs:

PLEASE TAKE NOTICE that upon a certified copy of the record in the above case, the annexed petition, of which a copy is herewith served upon you, and the annexed brief, of which a copy is also herewith served upon you, I shall apply to the Supreme Court of the United States, at Washington, D. C., at the next motion day of said Court, on the 7th day of October, 1918, at the opening of the Court, or as soon thereafter as counsel can be heard, for a writ of certiorari in conformity with the prayer of the petition.

Dated, New York, July 18, 1918.

Yours, etc.,

JOHN W. GRIFFIN,
Counsel for the Petitioner.

To:

Messrs. BURLINGHAM, VEEDER, MASTEN & FEARY,
Proctors for Libelant.

4 SUPREME COURT OF THE UNITED STATES.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

Petition for Writ of Certiorari.

To the Supreme Court of the United States:

5 The petition of Rederiaktiebolaget Atlanten respectfully shows to the Court:

1. This is a petition for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Second Circuit affirming a decree of the District Court for the Southern District of New York in an admiralty case.

2. Your petitioner on the 30th day of September, 1914, chartered the steamship *Atlanten* under the common government form of time charter for a voyage from the United States to Danish ports, but with the following clauses added:

6 "21. If any dispute arises the same to be settled by two referees, one appointed by the Captain and one by charterers or their agents, and if necessary, the arbitrators to appoint an Umpire. The decision of the arbitrators or Umpire, as the case may be, shall be final, and any party attempting to revoke this submission to arbitration without leave of a court, shall be liable to pay to the other, or others, as liquidated damages, the estimated amount of chartered freight.

24. Penalty for non-performance of this agreement to be proven damages, not exceeding estimated amount of freight." 7

3. The charter-party will be found printed in the record, page 5. After the making of the charter-party, the conditions of the European War changed. Great Britain first materially modified the principles of International Law in the order in Council of October 29th, 1914. Immediately thereafter the seizure and detention of neutral vessels began. The British proclamation of November 2, 1914, gave "notice that the whole of the North Sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft and all other vessels, will be exposed 8
to the greatest dangers, from mines which it will be necessary to lay, and from warships searching vigilantly, by night and by day, for suspicious craft." All vessels were required to enter the North Sea through Dover Strait, and a patrol was kept at both entrances of the North Sea to intercept vessels going to Danish and other ports which were accessible to Germany. Submarine operations did not become common until November, 1914, and the raids of the German fleet and other ferocities upon the British Coast at Scarborough and other places did not begin until December, 1914. These changed conditions forced steamship owners to pay heavy war premiums, and made the charter a very serious 9
loss to the owners. The owner claimed that under Clause 24, above quoted, the parties had agreed that in case of non-performance of the agreement, proven damages should be recovered not exceeding the estimated amount of freight, and offered to pay to the charterer a sum equal to the total amount of the freight which would be earned on the charter-party, and desired to have the question whether it had a right to do so under the charter determined by

10 arbitration. Instead of arbitrating the owner began suit in the United States District Court.

4. As is stated in the ninth article of the answer, page 17, libelant, the charterer, was a Danish corporation; the respondent, the shipowner, a Swedish corporation. The answer states that the charter-party was signed in Denmark and provided for arbitration in case of dispute, and that both by the law of Sweden and Denmark the arbitration clause was binding and was a condition precedent to the right of either party to sue the other (Articles Eleventh and Twelfth, pp. 17, 18).

5. The thirteenth article of the answer printed on
11 page 18 of the record alleges that the respondent has been ready and willing at all times to arbitrate, but that the libelant has failed and neglected to do so, and the fourteenth clause of the answer states that under the law of Denmark and Sweden libelant had no right to bring any libel in any court for, upon or by reason of any matter or dispute set forth or referred to in the libel herein, but was obliged to submit the same to arbitration in accordance with the terms of the charter-party (Record, p. 18).

6. The libelant excepted to the validity of these allegations of the answer.

7. The case involves a question of gravity and
12 of importance in our general jurisprudence. Two foreigners have entered into a valid contract in Denmark, valid both by the law of Denmark and Sweden, where the respective corporations reside, that they will arbitrate disputes arising under the charter-party. The question is whether one of them can make this contract, solemnly entered into, an absolute nullity, by starting a proceeding in the United States Court, a country with which they have no connection.

Your petitioner prays that this Honorable Court 13
may be pleased to grant a writ of certiorari in this cause to the Circuit Court of Appeals for the Second Circuit, to bring up the cause to this Honorable Court for such proceedings therein as shall seem just, and that your petitioner may have such other or further relief and remedy in the premises as to this Court may seem proper and in conformity with the laws of the United States, and your petitioner will ever pray.

REDERIAKTIEBOLAGET ATLANTEN,
Petitioner,

By HAIGHT, SANDFORD & SMITH, 14
Proctors for Petitioner.

JOHN W. GRIFFIN,
Counsel for Petitioner.

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16 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

JOHN W. GRIFFIN, being duly sworn, says:

I am a member of the firm of Haight, Sandford & Smith, proctors for the petitioner herein.

I have read the foregoing petition, and the same is true to the best of my knowledge, information and belief.

The reason why this verification is not made by the petitioner is that it is a foreign corporation, and the reason that it is not made by one of its officers is that none of them is within the United States.

This application is made in good faith and not
17 for the purpose of delay.

JOHN W. GRIFFIN.

Sworn to before me this
19th day of July, 1918.

BRENT W. BLYTHE,
Notary Public,
New York County, No. 175.

I DO HEREBY CERTIFY that I have examined the foregoing petition and that, in my opinion, it is well founded and entitled to the favorable con-
18 sideration of this Court.

JOHN W. GRIFFIN.

SUPREME COURT OF THE UNITED STATES.

AKTIESELSKABET KORN-OG FODERSTOF KOMPAGNIET,
Libelant,

against

REDERIAKTIEBOLAGET ATLANTEN,
Respondent-Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement.

The leading facts are sufficiently set forth in the petition.

I.

The cases which decide that arbitration agreements are invalid are not legally sound.

There is no legal principle on which an arbitration agreement made by competent persons, without any fraud or undue influence should not be enforced as much as any other contract which they make. It is well known that the only reason why a contrary rule arose in England was that Judges in the early days were paid on the fee system and desired to retain as many cases in the courts as possible. As Lord Campbell said in *Scott* v. *Avery*, 4 H. L. Cas., 811, the rule arose

"in the contests of the courts of ancient times for extension of jurisdiction—all of them being op-

posed to anything that would altogether deprive every one of them of jurisdiction."

In modern times the Courts show no such disposition to extend their jurisdiction. There certainly is no reason why they should wish to nullify contracts between parties to have their disputes disposed of by other tribunals. As a matter of fact, arbitration is continually on the increase. It is being introduced to settle International questions and labor disputes, as well as commercial disputes. Our Stock, Produce and other Exchanges have permanent arbitration boards. That the tendency is to limit cases which refuse to enforce arbitration agreements, not to extend them, appears from *Hamilton* v. *Home Insurance Co.,* 136 U. S., 242, and *Hamilton* v. *Home Insurance Co.,* 137 U. S., 370. In the former case there was a provision in the arbitration contract that the amount of the recovery must be arbitrated, and that such an arbitration was a condition precedent to the bringing of suit. The Court enforced the arbitration agreement. In the latter case there was no such provision and the Court followed previous cases and refused to enforce the arbitration agreement.

II.

The case at bar is distinguishable from most arbitration agreements because it relates to a contract made abroad by citizens of Denmark and Sweden, where such contracts are legally binding.

It is believed that where a contract is made by citizens of the United States in the United States, providing for arbitration, the United States Su-

preme Court should overrule previous cases and hold that such an arbitration agreement is binding. At the present time the New York Produce Exchange has in press a book to show that the cases where the enforcement of arbitration agreements has been refused, have been ill considered and have not been based on any proper legal principle. In the case at bar Judge Hough, speaking in the Circuit Court of Appeals, said:

"As to Clause 21, it is undeniable that American authorities are at present as stated in the Court's opinion. Whether the rule as given can long survive historical and logical criticism I venture to doubt."

The only reason why Judge Hough concurred with the majority was that he considered that the respondents had repudiated their agreement *in toto,* and had thereby deprived themselves from insisting upon the arbitration provision. The majority of the Court, however, points out that this is not the case, and says at the beginning of the last paragraph, page 41 of the record:

"The respondent does not seek to repudiate the charter, but contends that it authorizes a withdrawal at any time."

That is an accurate statement of the owner's position. It does not claim that the charter is not a binding agreement, but, on the contrary, claims that it is, and states that under the charter it is entitled to give up the voyage and make a cash payment instead, and that this question should have been arbitrated pursuant to Clause 21, when the vessel arrived in port, ready to make the voyage, so that the matter could have been quickly disposed of and the voyage made, if the decision were against the owners.

The situation, however, in the case at bar, is not one of overruling American decisions but of refusing to extend a rule which we submit was always unfortunate, so that it shall apply to foreigners in connection with a contract made abroad.

It is one thing to say that under American law, where Americans in the United States made a contract, our Courts will not enforce it, because such a contract was invalid from its inception; and quite another to say that where a valid contract to arbitrate was made in Denmark by a citizen of Denmark, that this Court will refuse to enforce that foreign law and will nullify the provisions of a contract which was absolutely valid and binding upon the parties when made. It is stated in the eleventh and twelfth clauses of the answer that under the law of Sweden and Denmark arbitration was a condition precedent to the right to bring suit (Record, pp. 17, 18). Where arbitration is a condition precedent, it will be enforced (*Hamilton* v. *Home Insurance Co.*, 136 U. S., 242). That a provision for arbitration is a matter of right, not of remedy. See *Hamlyn* v. *Talisker Distillery*, L. R. (1894), A. C., 202. See also *Mittenthal* v. *Mascagni*, 183 Mass., 21.

In this connection it is perhaps sufficient to refer to the language of Mr. Justice Holmes in the case of *Cuba Railroad Co.* v. *Crosby*, 222 U. S., 473, at page 479:

"The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

III.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. GRIFFIN,
Counsel for Rederiaktiebolaget Atlanten.

July 19, 1918.